

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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| UNITED STATES OF AMERICA | : | |
| | : | |
| v. | : | CR No. 13-173S |
| | : | |
| HAROLD GOMEZ | : | |

REPORT AND RECOMMENDATION

PATRICIA A. SULLIVAN, United States Magistrate Judge.

This matter has been referred to me pursuant to 28 U.S.C. § 636(b)(1)(B) and 18 U.S.C. § 3401(i) for proposed findings of fact concerning whether Defendant Harold Gomez is in violation of the terms of his probation and, if so, for a recommended disposition. In compliance with that directive and in accordance with 18 U.S.C. § 3565(a) and Fed. R. Crim. P. 32.1, a hearing was conducted on January 9, 2017. At the hearing, after being advised of the guidelines applicable to the violations and to the original offense, Defendant, both personally and through counsel, waived a violation hearing and admitted that he had violated the terms of his probation. I ordered that he be detained. Based upon the following analysis and Defendant's admissions, I recommend that the Court impose a sentence of seven months incarceration to be followed by a twenty-four-month term of supervised release. While on supervised release, I recommend that Defendant be required to comply with the following conditions:

Defendant shall participate in a program of substance abuse treatment (inpatient or outpatient) as directed and approved by the Probation Office.

Defendant shall participate in a program of substance abuse testing (up to 72 drug tests per year) as directed and approved by the Probation Office.

Defendant shall participate in and satisfactorily complete a program for mental health treatment, to include addressing anger management issues, as directed and approved by the Probation Office.

Defendant shall contribute to the cost of all ordered treatment and testing based on ability to pay as determined by the probation officer.

Defendant shall spend the first 3 months of supervised release on Home Detention with radio frequency monitoring and will be restricted to his residence every day. Exceptions to home detention: employment, education, religious services, medical treatment, substance abuse or mental health treatment, attorney visits, court appearances, court-ordered obligations or other activities as pre-approved by the officer. In the discretion of Probation or by further order of the Court, this restriction may be stepped down to radio frequency monitoring and/or a curfew.

Defendant shall participate in a manualized behavioral program as directed by the USPO. Such program may include group sessions led by a counselor or participation in a program administered by the USPO. Defendant shall pay for the cost of treatment to the extent he is able as determined by the probation officer.

The Court makes a judicial recommendation that Defendant consider participation in the HOPE Court program.

I. BACKGROUND

On August 25, 2016, the Probation Office petitioned the Court, which issued a warrant on the same date. On January 9, 2017, Defendant completed the incarcerative sentence based on his guilty plea to the charges underlying Violation No. 1, was released by the Commonwealth of Massachusetts, was transferred into federal custody and appeared before this Court. At that hearing, he admitted to the following violations:

Violation No. 1: While on probation, the defendant shall not commit another federal, state or local crime.

On August 20, 2016, Mr. Gomez was arrested by Lawrence Police and charged with Assault & Battery on Family/Household Member/Intimate Partner and Strangulation or Suffocation. At the time the petition was filed, he remained held with a bond at the Middletown House of Corrections in Middletown, Massachusetts.

Violation No. 2: The defendant shall refrain from any unlawful use of a controlled substance.

Mr. Gomez used marijuana as evidenced by his positive urine screens on November 25, December 8, and 30, 2014; January 23, February 3, 6, 10, 18, and 27, and March 3, 2015, and; July 12 and 26, and August 9, 2016. Mr. Gomez used cocaine as evidenced by his positive drug tests on February 10, 2015, and March 8 and August 9, 2016. Additionally, Mr. Gomez submitted diluted urine screens on March 31, April 3, May 5, June 5, 7, 17, and 26, September 2, and November 20, 2015, and; March 8, 2016.

Violation No. 3: The defendant shall not leave the judicial district without permission of the court or probation officer.

On March 22, 2016, Mr. Gomez left a voice message that he was residing and working in Massachusetts. On March 25, 2016, Mr. Gomez reported to the probation office and was instructed that he could not reside in Massachusetts and he needed to relocate back to Rhode Island. On April 20, 2016, Mr. Gomez was informed again that he needed to relocate back to Rhode Island. Mr. Gomez continued to reside in Massachusetts until the end of June 2016. On August 20, 2016, when Mr. Gomez was arrested by the Lawrence Police Department, he did not have permission to be in Massachusetts.

Violation No. 4: The defendant shall participate in a program of substance abuse testing (up to 72 drug tests per year) as directed and approved by the probation office. The defendant shall contribute to the costs of such treatment based on ability to pay as determined by the probation officer.

Mr. Gomez failed to report for drug testing on April 29, May 2 and 31, June 13 and 30, July 5, and August 15, 2016.

Violation No. 5: The defendant is required to obtain his GED during his term of probation.

Mr. Gomez has failed to make any efforts to obtain his GED despite being provided resources to satisfy this special condition.

Violation No. 6: The defendant shall participate in a program of mental health treatment as directed and approved by the Probation Office. The defendant shall contribute to the costs of such treatment based on ability to pay as determined by the probation officer.

On October 20 and 26, and November 2, 2015, Mr. Gomez missed treatment appointments at Community Care Alliance in Woonsocket, Rhode Island. On November 9, 2015, Mr. Gomez cancelled his treatment appointment at Community Care Alliance. On March 29, April 4, May 16, June 27, July 25, and

August 1 and 8, 2016, Mr. Gomez was a no show for his dual diagnosis treatment at Fellowship Health Resources in Cranston, Rhode Island. In addition to these dates, Mr. Gomez cancelled his appointments at Fellowship for January 20 and July 11, 2016.

Based on Defendant's admission to these violations, I find that he is in violation of the terms and conditions of his probation.

II. APPLICABLE LAW

Title 18 U.S.C. § 3565(a)(1) and (2) provides that if the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may, after a hearing pursuant to Fed. R. Crim. P. 32.1 and after considering the factors set forth in § 3553(a) to the extent that they are applicable, (1) continue the defendant on probation, with or without extending the term or modifying or enlarging the conditions or (2) revoke the sentence of probation and resentence the defendant under Subchapter A. However, the court must consider the policy statement detailed in Chapter 7 of the United States Sentencing Guidelines ("USSG"). In this case, the statutory maximum term of imprisonment for the original offense is ten years, and the maximum authorized term of probation that could have been imposed for the original offense is five years; the guidelines range applicable to the original offense was between thirty-three and forty-one months.

Section 7B1.1 of the USSG provides for three grades of violations (A, B and C). Subsection (b) states that where there is more than one violation, or the violation includes more than one offense, the grade of violation is determined by the violation having the most serious grade.

Section 7B1.1(a) of the USSG provides that a Grade A violation constitutes conduct that is punishable by a term of imprisonment exceeding one year that (i) is a crime of violence, (ii) is a controlled substance offense, or (iii) involves possession of a firearm or destructive device, or

any other offense punishable by a term of imprisonment exceeding twenty years. Grade B violations are conduct constituting any other offense punishable by a term of imprisonment exceeding one year. Grade C violations are conduct constituting an offense punishable by a term of imprisonment of one year or less; or a violation of any other condition of supervision. Section 7B1.3(a)(1) states that upon a finding of a Grade A or B violation, the Court shall revoke supervision. Subsection (a)(2) states that upon a finding of a Grade C violation, the Court may revoke, extend, or modify the conditions of probation. In this case, Defendant has committed a Grade B violation; therefore, the Court shall revoke probation.

Should the Court find that the defendant has committed a Grade B or C violation, § 7B1.3(c)(1) states that where the minimum term of imprisonment determined under § 7B1.4 is at least one month, but not more than six months, the minimum term may be satisfied by (A) a sentence of imprisonment; or (B) a sentence of imprisonment that includes a term of probation with a condition that substitutes community confinement or home detention according to the schedule in § 5C1.1(e) for any portion of the minimum term. Should the Court find that the defendant has committed a Grade B or C violation, § 7B1.3(c)(2) states that where the minimum term of imprisonment determined under § 7B1.4 is more than six months but not more than ten months, the minimum term may be satisfied by (a) a sentence of imprisonment; or (b) a sentence of imprisonment that includes a term of probation with a condition that substitutes community confinement or home detention according to the schedule in § 5C1.1(e), provided that at least one half of the minimum term is satisfied by imprisonment. The first provision, which allows for alternatives for any portion of the minimum term, applies to this matter.

Pursuant to § 7B1.3(d), any restitution, fine, community confinement, home detention, or intermittent confinement previously imposed in connection with the sentence for which

revocation is ordered that remains unpaid or unserved at the time of revocation shall be ordered to be paid or served in addition to the sanction determined under § 7B1.4 (Term of Imprisonment), and any such unserved period of confinement or detention may be converted to an equivalent period of imprisonment. In this case, there is no outstanding restitution, fine, community confinement, home detention or intermittent confinement.

Pursuant to § 7B1.3(e), where the court revokes probation and imposes a term of imprisonment, it shall increase the term of imprisonment by the amount of time in official detention that will be credited towards service of the term of imprisonment under 18 U.S.C. § 3585(b), other than time in official detention resulting from the federal probation violation warrant or proceeding. Defendant entered the Massachusetts House of Corrections on August 20, 2016, to serve the sentence for the underlying state charge. He entered official detention resulting from the federal probation violation on January 9, 2017.

Pursuant to § 7B1.3(g)(1), where probation is revoked and a term of imprisonment is imposed, the provisions of §§ 5D1.1-1.3 shall apply to the imposition of a term of supervised release. Pursuant to 18 U.S.C. § 3583(b), the maximum statutory term of supervised release that can be imposed for a class A or B felony is five years, class C or D felony is three years and class E felony or class A misdemeanor is one year. Section 5D1.1(a) states that if a sentence of imprisonment of more than one year is imposed, the court shall order a term of supervised release to follow imprisonment. Subsection (b) states that the court may order a term of supervised release in any other case. Section 5D1.2 states that if a term of supervised release is imposed, the length shall be between three and five years for a defendant convicted of a class A or B felony, between two and three years for a defendant convicted of a class C or D felony, or one year for a defendant convicted of a class E felony or class A misdemeanor. In this case,

Defendant was convicted of a class C felony; therefore, the maximum statutory term of supervised release that may be imposed to follow imprisonment is three years. If a term of supervised release is to be imposed, the guideline term shall be between two and three years.

Section 7B1.4(a) of the USSG provides that the Criminal History Category is the category applicable at the time the defendant was originally sentenced. In this instance, Defendant had a Criminal History Category of I at the time of sentencing.

Section 7B1.5(b) of the USSG provides that, upon revocation of probation, no credit shall be given toward any term of imprisonment ordered, for any portion of the term of probation served prior to revocation.

Should the Court revoke probation, the Revocation Table provided for in § 7B1.4(a) provides the applicable imprisonment range. In this case, Defendant committed a Grade B violation and has a Criminal History Category of I. Therefore, the applicable range of imprisonment for this violation is four to ten months.

III. ANALYSIS

On November 24, 2014, Defendant pled guilty to making a false statement in a United States passport application and conspiracy to allow an inadmissible alien into the United States. While the matter was pending, he was released on bail. After he pled guilty, he was sentenced to three years of probation, with four weekends to be served at the Wyatt Detention Facility during the first six months of probation. Probation commenced on November 21, 2014, with a projected expiration date of November 20, 2017. On February 12, 2015, the Court modified the conditions to add the requirement of mental health treatment based on Defendant's persistent use of marijuana beginning within days after probation began, which Defendant justified as self-medication to treat depression and anxiety related to his financial circumstances.

From the very commencement of probation, Defendant has evinced what might generously be labeled as a lackadaisical and irresponsible attitude towards his conditions. He has worked sporadically at temporary jobs, but did not obtain consistent employment. Despite the resources provided by Probation, he failed to make any efforts to obtain his GED; this conduct resulted in Violation No. 5. Reflecting his struggle with addiction, he repeatedly failed to appear for drug testing and persistently used marijuana, cocaine and alcohol, resulting in Violation Nos. 2 and 4. However, despite blaming substance abuse and related noncompliance on mental health issues, Defendant repeatedly missed or canceled mental health treatment appointments, resulting in Violation No. 6. Very troubling is Violation No. 3, which is based on Defendant's disregard of the condition that he must remain within the District of Rhode Island unless he had permission from Probation to leave the state. The conduct underlying Violation No. 3 is flagrant – it includes his move to Massachusetts without permission and his defiant decision to remain in Massachusetts despite repeated instructions from Probation to return to Rhode Island. While these Violations (2 through 6) all reflect technical noncompliance and some of the conduct is certainly linked to addiction, much of the conduct – particularly the complete failure to do anything about his GED and the unilateral decision to decamp to Massachusetts – appears to derive from an attitude that he cannot be controlled by the Court's conditions. The sheer number of technical violations reflects Probation's efforts to bring him into compliance and Defendant's utter disregard for those efforts.

Most troubling is Violation No. 1, based on the commission of the crimes of assault and battery on a family/household member/intimate partner and the felony of strangulation or suffocation on August 20, 2016. The victim, the girlfriend with whom Defendant had been improperly living in Lawrence, Massachusetts, was observed by law officers with marks on her

throat; Defendant also had scratches on his face and arms from when she thrashed out at him. The attack occurred in the presence of the victim's teenage son. Both Defendant and his girlfriend had been drinking. The drinking spree and the assault that resulted from it all occurred in Massachusetts, where Defendant was not authorized to be. Notably, these events occurred after Defendant had been twice ordered back to Rhode Island and after Defendant reported to Probation that he had returned to Rhode Island. Also material to the Court's sentencing decision is Defendant's criminal history, which includes two domestic violence offenses, albeit from the 1990s.

Following his arrest on August 20, 2016, by the Lawrence police, the Massachusetts district court held a hearing and found Defendant to be dangerous; he was held without bail. After he pled guilty to both assault and the felony of strangulation, he was sentenced to two and a half years, with six months to serve. Upon completion of this sentence, he was transferred into federal custody on January 9, 2017.

Based on the seriousness of the violations, the government recommended that the Court impose an incarcerative sentence of nine months, which is one month less than the high end of the guidelines range, with the one-month reduction based on Defendant's admission. The government also asked the Court to impose a twenty-four month term of supervised release; this would expand the total time under supervision (including the time spent on probation before his August 20, 2016, arrest) to almost four years. Such a period of supervision will provide an opportunity for Defendant to get his life in order; consistent with that goal and to provide Defendant with the structure that he obviously needs, the government asked that the first three months of supervision be on home detention with electronic monitoring, with Probation having the option to switch to a curfew. The government urged the Court to look past Defendant's

attempt to blame addiction for his struggle with Probation and his mismanaged life, particularly in light of Defendant's failure to take advantage of the mental health treatment Probation made available to him.

Arguing that all of his conduct derives from addiction, Defendant urged the Court to impose no more incarceration and instead to recommend intensive inpatient substance abuse and mental health treatment, with electronic monitoring to assure compliance. He argued that he has already served a state sentence for the new criminal activity and that, while incarcerated, he completed a substance abuse treatment program and attended a GED course, although he did not have time to complete it. Defendant sought to justify his disregard for the condition that he remain in Rhode Island with the argument that, even when he was living outside of Rhode Island, he kept in contact with Probation. Moreover, he claimed that he was employed in Massachusetts, while in Rhode Island he was homeless. He acknowledged that, because of his addictions, he will need help to transition back into society and to sustain himself with gainful employment.

On allocution, despite his guilty plea, Defendant declined to accept responsibility for the Massachusetts crimes, stating that the assault and battery charge was fabricated by his girlfriend's daughter and that the girlfriend herself refused to testify based on the Fifth Amendment. In any event, he asked the Court to find that all of his noncompliance is caused by his addiction to marijuana and cocaine. He echoed his counsel's assertion that he went to Massachusetts for work, kept in contact with Probation while he was there and, after Probation forced him to return to Rhode Island, became homeless. He claimed that he missed treatment only because of transportation problems and that he benefited greatly from it. After serving time in prison, he said that it was the worst experience of his life and that he now realizes that he must

focus on himself so that he can begin working and taking care of his elderly father. He asked the Court to require him to attend inpatient treatment with electronic monitoring and not to impose a sentence of incarceration.

This case presents a difficult decision for the Court because this Defendant spent almost no time incarcerated as a result of the underlying offense. Yet his utter disregard for the Court's conditions now calls for a far harsher punishment. If the record reflected genuine efforts by Defendant to comply, with noncompliance truly linked to his struggle with addiction, my recommendation might well reflect Defendant's proposal that the consequence should be the imposition of the structure of electronic monitoring with a referral for residential treatment. However, based on all of the information presented to the Court, including Defendant's allocution, I find that Defendant's struggle with addiction explains only a small part of the conduct to which he has admitted. To the contrary, I find that Defendant has seriously breached the Court's trust and has yet to accept that it is his responsibility to comply with his conditions. In addition, his move to Massachusetts, far from reflecting stable and steady employment, led to the serious crimes of assault and strangulation, raising the concern of public safety.

Based on the foregoing, I endorse the government's argument that a period of incarceration is necessary. Nevertheless, the total period proposed for significant impairment of Defendant's liberty by the government (nine months of incarceration, followed by three months of home detention, for a total of a full year) seems excessive. Because I find that Defendant's need for stability is such that he will certainly benefit from a three-month period of home detention when he resumes supervision, I urge the Court to impose a somewhat lesser term of incarceration to bring the total period of impairment of liberty down to ten months, which is at the high end of the applicable guidelines range. Therefore, I recommend that the Court impose a

seven-month period of imprisonment to be followed by a twenty-four-month term of supervised release, with the first three months to be spent on home detention or a curfew in Probation's option.

IV. CONCLUSION

After considering the appropriate factors set forth in 18 U.S.C. § 3553(a) and for the reasons expressed above, I recommend that the Court impose a sentence of seven months incarceration to be followed by a twenty-four-month term of supervised release. While on supervised release, I recommend that Defendant be required to comply with the following conditions:

Defendant shall participate in a program of substance abuse treatment (inpatient or outpatient) as directed and approved by the Probation Office.

Defendant shall participate in a program of substance abuse testing (up to 72 drug tests per year) as directed and approved by the Probation Office.

Defendant shall participate in and satisfactorily complete a program for mental health treatment, to include addressing anger management issues, as directed and approved by the Probation Office.

Defendant shall contribute to the cost of all ordered treatment and testing based on ability to pay as determined by the probation officer.

Defendant shall spend the first 3 months of supervised release on Home Detention with radio frequency monitoring and will be restricted to his residence every day. Exceptions to home detention: employment, education, religious services, medical treatment, substance abuse or mental health treatment, attorney visits, court appearances, court-ordered obligations or other activities as pre-approved by the officer. In the discretion of Probation or by further order of the Court, this restriction may be stepped down to radio frequency monitoring and/or a curfew.

Defendant shall participate in a manualized behavioral program as directed by the USPO. Such program may include group sessions led by a counselor or participation in a program administered by the USPO. Defendant shall pay for the cost of treatment to the extent he is able as determined by the probation officer.

The Court makes a judicial recommendation that Defendant consider participation in the HOPE Court program.

Any objection to this report and recommendation must be specific and must be served and filed with the Clerk of the Court within fourteen (14) days after its service on the objecting party. See Fed. R. Crim. P. 59(b); DRI LR Cr 57.2(d). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district judge and the right to appeal the Court's decision. See United States v. Lugo Guerrero, 524 F.3d 5, 14 (1st Cir. 2008); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Patricia A. Sullivan

PATRICIA A. SULLIVAN
United States Magistrate Judge
January 23, 2017